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No. 08-1318

Supreme Court, U.S.
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In The

Supreme Court of the United States

B. MICHAEL SCHNEIDER,

Petitioner,

vs.

THE RYLAND GROUP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Petitioner has waived his argument by not addressing it in the lower courts that the amended Illinois Real Estate Licensing Act was improperly applied to the parties' agreement?

2. Whether certiorari is warranted because the lower court rulings did not create any confusion or conflict in the law?

3. Whether the dismissal of the Petitioner's complaint by the lower courts as a matter of law while the Petitioner maintained a demand for a trial by jury is a violation of the State of Illinois Constitution and the Seventh Amendment to the U.S. Constitution?

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STATEMENT OF JURISDICTION

Petitioner invoked the jurisdiction of this Court under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

I. Procedural History

On August 28, 2006, the Circuit Court of Cook County, Illinois, dismissed the Petitioner's complaint with prejudice. The Illinois Appellate Court affirmed the Circuit Court on May 1, 2008. The Petitioner proceeded to file two motions in the Illinois Appellate Court, namely, 1) a Motion to Vacate the Order Entered by the Appellate Court and the Trial Court, and 2) Plaintiff's Motion for Oral Argument and Request to Vacate the Order Entered by the Court on May 1, 2008. Both motions were denied on July 9, 2008. Within the appropriate time period, Petitioner filed a Petition for Appeal as of Right and Petition for Leave to Appeal with the Illinois Supreme Court which the court denied on September 24, 2008. Petitioner also filed with the Illinois Supreme Court a Motion for a Supervisory Order pursuant to Illinois Supreme Court Rule 383, which the court denied on October 20, 2008. Petitioner then filed a Motion to Recall Mandate and a Motion to Reconsider the Motion to Vacate the Order of the Circuit Court that dismissed Count I, the Breach of Contract claim. Neither of those motions were considered because the Illinois Appellate Court had lost jurisdiction and an

appropriate order to that effect was entered on January 16, 2009.

II. Facts Relevant to the Petition

Petitioner alleged that he entered into a "verbal open listing agreement" with North Central College (the "College") to locate a buyer for property located in DuPage Township, Will County. (Petitioner's Appendix 3a).[1] Petitioner approached an agent of The Ryland Group, Inc. ("Ryland") to discuss the subject property and requested that he sign a written agreement concerning the above-referenced property captioned "Buyer's Acknowledgment of Site Visit" (the "Agreement") (Pet. App. 3a-4a). Under the terms of the above-document Ryland agreed to name the Petitioner "as the procuring broker in any future offer to purchase, letter of intent or subsequent contract made for the above named parcel," and further stated that it would "guaranty the payment of 5 percent of the resulting gross sales price payable at closing" with the express statement that "any commissions will be payable by the seller first and we the buyer secondly." (Pet. App. 4a). The College denied, in writing, that there was any agreement with the Petitioner or that it had reached an understanding with the Petitioner to list the subject property. (Pet. App. 5a).

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[1] Reference to Petitioner's Appendix appears as "Pet. App. ___" hereinafter.

Approximately two (2) years later Ryland did purchase the property from the College pursuant to the efforts of a different broker. (Pet. App. 5a). Petitioner was not involved in the eventual sale of the property but upon learning of the transaction made demand on Ryland for payment of a commission under the Agreement. (Pet. App. 5a). Ryland refused to pay the Petitioner a commission and urged that if anyone was responsible to pay Petitioner, the College was responsible for the payment of any commission pursuant to his alleged listing agreement. (Pet. App. 5a). In any event, the Agreement with Ryland did not contain a provision providing for its automatic expiration within a definite period, therefore, rendering it void for failure to comply with legal requirements under the Illinois Administrative Code Section 1450.195 and other subsequently enacted Illinois statutes. (Pet. App. 5a, 6a, 14a-15a). At the time the parties executed the Agreement, Section 1450.195 of the Illinois Administrative Code required written brokerage agreements to contain a definite termination date. (Pet. App. 14a).

After the parties fully briefed the matter and a hearing was held on the Ryland's motion to dismiss, the trial court determined that the allegations contained in the Petitioner's complaint were insufficient as a matter of law and dismissed the entire action with prejudice. (Pet. App. 14a, 24a). The trial court's August 28, 2006, six (6) page decision discussed the grounds for dismissal of the complaint. (Pet. App. 17a-24a). The court granted Ryland's

motion to dismiss Count I of the complaint pursuant to the Illinois Code of Civil Procedure, 735 ILCS 5/2-619 and determined that the Agreement was "void" under the Illinois Real Estate License Act of 1983, 225 ILCS 454/10-25 ("RELA") because it did not provide "for an automatic expiration within a definite period, and thus failed to comply with the statutory requirements" (Pet. App. 14a and 24a). Petitioner did not object to the application of the RELA by the trial court, as demonstrated by the issues discussed by the court in its order. (Pet. App. 17a-24a). Similarly, the Petitioner did not object to the application of the revised RELA in the Illinois Appellate Court and did not argue the issue in his Brief and Argument of Plaintiff-Appellant nor the Reply Brief of Plaintiff-Appellant, as evidenced by that court's discussion of the issues on appeal and arguments raised by Petitioner. (Pet. App. 2a-16a).

ARGUMENT

The Petitioner long ago waived his argument that the RELA, which requires a brokerage agreement to have a definite termination date, was not enacted by the Illinois General Assembly until after the parties had signed the agreement. For the first time, Petitioner has also presented a constitutional argument that the Seventh Amendment of the U.S. Constitution prohibited the dismissal of his complaint in the trial court because he had demanded trial by a jury. Petitioner failed to properly raise any of these

arguments in the lower courts and he is simply moving from past arguments to new arguments as he advances through the courts. Additionally, the Petitioner attempts to argue, unsuccessfully, that his right to a jury trial prohibits the dismissal of his complaint even though that dismissal was as a matter of law.

I. Petitioner has waived his arguments regarding the application of the RELA and his right to a jury trial pursuant to the State of Illinois Constitution and the Seventh Amendment of the U.S. Constitution.

This Court has stated as a general rule that issues must be raised in lower courts to be preserved as potential grounds of decision in higher courts. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469, 120 S.Ct. 1579, 1586, 146 L.Ed.2d 530 (2000), *citing Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174-175, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988). While this "principle does not demand the incantation of particular words . . . it requires that the lower court be fairly put on notice as to the substance of the issue." *Id.* The Petitioner never put the lower courts on notice of his arguments that the RELA was unfairly applied. (Pet. App. 3a, 20a and 24a). The trial court and the appellate court both identified the arguments and issues raised by the Petitioner and the courts' discussion of points raised is devoid of any issue concerning the retroactive application of the revised RELA. (Pet. App. 3a, 20a and 24a). Accordingly, the

Petitioner's arguments concerning the "retroactive" application of the amended RELA have been waived.

Additionally, the Petitioner's argument that the dismissal of his complaint in light of his jury demand violates the Seventh Amendment of the U.S. Constitution has been waived. This Court has previously stated that

> [w]ith "very rare exceptions," *Yee v. Escondido,* 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997) (citations omitted). See also, *Ellis v. Dixon*, 349 U.S. 458, 463-464, 75 S.Ct. 850, 854, 99 L.Ed. 1231 (1955), *rehearing denied*, 76 S.Ct. 37, 350 U.S. 855, 100 L.Ed. 759 (1955). The trial court and appellate court identified the issues raised by the Petitioner and his argument that the trial court's dismissal of his complaint violated his Seventh Amendment rights is absent from their discussions of issues raised because it was raised for the very first time in his writ for certiorari. (Petition, 5). Accordingly, this constitutional argument has been waived and is not properly before this Court.

II. Certiorari is not warranted because the lower court's dismissal as a matter of law did not create any confusion or conflict in the law. The Agreement at issue was invalid under the existing law at the time the Agreement was entered into and invalid under the law at the time the Petitioner sought to enforce its terms.

Even if Petitioner had properly preserved the issue of whether or not the application of the RELA to the parties' agreement was proper, it would not merit review because no conflict, or even confusion, over the issue exists.[2] At the time the parties signed their agreement, Section 1450.195 of the Illinois Administrative Code required a written brokerage agreement to have a definite expiration date. (Pet. App. 14a). Whether the RELA should have been applied by the trial court is not a meritorious issue in light of the fact that the Illinois Administrative Code, which was in full force and effect during the relevant time

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[2] It is well-established in Illinois that the trial court may dismiss a complaint as a matter of law without violating the plaintiff's right to trial by jury when it is apparent that there are no disputed facts that would support the cause of action. *Fitzpatrick v. Pitcairn*, 371 Ill. 203, 207, 20 N.E.2d 280, 282 (Ill. 1939). Likewise, under federal standards "[n]either a summary judgment nor the direction of a verdict infringes the right to a jury trial preserved by the Seventh Amendment to the Constitution where the question is one of law." *Whitsell v. Alexander*, 229 F.2d 47, 49 (7th Cir. 1956), *citing Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320, 23 S.Ct. 120, 47 L.Ed. 194 (1902).

period, had the same requirement and Ryland argued for its application to the parties' Agreement in the lower courts, a fact which was noted by the Illinois Appellate Court. (Pet. App. 14a). The Illinois Administrative Code has the force and effect of law, and, like a statute, it is presumed valid. *People v. Selby*, 298 Ill.App.3d 605, 611, 698 N.E.2d 1102, 1107 (4th Dist. 1998). See also, *Granite City Div. of Nat. Steel Co. v. Illinois Pollution Control Board*, 155 Ill.2d 149, 164, 613 N.E.2d 719, 726 (1993) (administrative regulations, like statutes, are presumed to be valid). The validity of the Illinois Administrative Code has not been challenged by the Petitioner.

The parties' Agreement is an executory bilateral contract which was subject to the evolving laws. At the time of execution, both parties' obligations were still unfulfilled. While the validity of a contract is "generally determined under the law as it existed when the contract was made," the imposition of new law may make the original contract provision invalid under current public policy, thus unenforceable. *Schniederjon v. Krupa*, 130 Ill.App.3d 656, 660, 474 N.E.2d 805, 808-809 (5th Dist. 1985). While public policy "strongly favors freedom to contract," a sufficiently important contrary public interest will make a private agreement void. *Kim v. Citigroup, Inc.*, 368 Ill.App.3d 298, 307, 856 N.E.2d 639, 647 (1st Dist. 2006). "Contractual provisions that violate public policy expressed in statutory law are unenforceable and void," even if they were made in compliance with older law. *Crossroads Ford Truck v. Sterling Truck*,

341 Ill.App.3d 438, 445, 792 N.E.2d 488, 494 (4th Dist. 2003). When the RELA was amended to require written brokerage agreements to include a definite termination date, the Agreement was subject to that change. See *infra.* p. 6.

In any event, at the time the Agreement was signed, Section 1450.195 of the Illinois Administrative Code required written brokerage agreements to contain a definite termination date. See *infra,* p. 6. In the absence of a statutory provision to the contrary, the requirements of the Illinois Administrative Code prevail. Therefore, it is irrelevant which law applied to the parties' Agreement because it failed to comply with the Illinois Administrative Code in effect at the time it was entered into and it failed to comply with the amended RELA at the time the Petitioner sought to enforce its terms.

III. Petitioner's argument that his complaint was dismissed as a matter of law by the lower courts in violation of his right to a jury trial under the State of Illinois Constitution and the Seventh Amendment of the U.S. Constitution, is not the law and not a meritorious issue for review.

Further, the Petitioner's argument that the trial court improperly dismissed his claims in light of the fact that he had a demand for a trial by jury in violation of the State of Illinois Constitution and the Seventh Amendment of the U.S. Constitution is without merit and is not a significant issue under

Supreme Court Rule 10. U.S. Sup. Ct. Rule 10, 28 U.S.C.A. As this Court is acutely aware, the principal purpose for which certiorari jurisdiction exists is to resolve conflicts among United States Courts of Appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 111 S.Ct. 1854, 1857, 500 U.S. 344, 347, 114 L.Ed.2d 385 (1991). As this Court noted in *Rice v. Sioux City Memorial Park Cemetery*, 75 S.Ct. 614, 616-617, 349 U.S. 70, 74, 99 L.Ed. 897 (1955), certiorari should not be granted except in cases involving the settlement of issues which are of importance to the public, as distinguished from that of parties, and in cases where there is a real and embarrassing conflict of opinion and authority between courts of appeals. No such conflict exists in the instant case.

The dismissal of the Petitioner's claims with prejudice by the trial court was decided as a matter of law by the lower courts pursuant to the Illinois Code of Civil Procedure for involuntary dismissal. (Pet. App. 16a, 24a). As noted previously, an Illinois trial court may dismiss a complaint as a matter of law without violating the plaintiff's right to trial by jury when it is apparent that there are no disputed facts that would support the cause of action. *Fitzpatrick*, 371 Ill. at 207, 20 N.E.2d at 282. Dismissal of a complaint as a matter of law despite the plaintiff's demand for trial by jury is entirely consistent with the federal court standards and is not a violation of the Seventh Amendment of the U.S. Constitution. "Neither a summary judgment nor the direction of a

verdict infringes the right to a jury trial preserved by the Seventh Amendment to the Constitution where the question is one of law." *Whitsell*, 229 F.2d at 49, *citing Fidelity,* 187 U.S. at 320. The Petitioner has not identified any conflict within the Illinois state courts, much less a conflict between the Illinois Code of Civil Procedure and any provision of federal law. This case does not properly raise any conflict amongst the courts or constitutional issues regarding a plaintiff's right to a jury trial that would merit this Court's review.

CONCLUSION

The Petitioner has waived the issues raised which are a denial of trial by jury under the Seventh Amendment of the U.S. Constitution and the improper application of the Illinois Real Estate Licensing Act by failing to raise those arguments in the trial court or the Illinois Appellate Court. In addition, the legal theory that the dismissal of a complaint as a matter of law wrongly deprives a plaintiff of a trial by jury is not accurate. Further, the application of the Illinois Administrative Code or an amended Illinois statute requiring an expiration term is not case dispositive since the agreement at issue was an executory bilateral contract modifiable by

evolutionary changes in the law prior to it becoming an executory contract.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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